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No. 26

# In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA AND BORG-WARNER CORPORATION (DETROIT GEAR DIVISION), APPELLANTS

*v.*

CITY OF DETROIT, A MUNICIPAL CORPORATION

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN*

## BRIEF FOR APPELLANTS

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## BRIEF FOR APPELLANTS

### OPINIONS BELOW

The opinion of the Circuit Court of Wayne County, Michigan (R. 38–40), is not reported. The opinion of the Supreme Court of Michigan (R. 49–56) is reported at 345 Mich. 601.

### JURISDICTION

The judgment of the Supreme Court of Michigan was entered on May 14, 1956. (R. 57.) A notice of appeal was filed by appellants United States and Borg-Warner Corporation on August 9, 1956. (R. 57–59.) On January 14, 1957, this Court noted probable jurisdiction. (R. 99.) The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U. S. C., Section 1257.

## QUESTION PRESENTED

The City of Detroit has assessed and collected taxes from a lessee of the United States (Borg-Warner) pursuant to a state statute which directs that taxes shall be collected from a lessee or user of tax-exempt realty "in the same amount and to the same extent as though the lessee or user were the owner of such property." A proviso in the statute creates an exception should the United States make an equivalent payment in lieu of these taxes. The statute further provides that the taxes shall constitute a debt of the lessee or user to the locality but shall not become a lien against the property.

The question presented is whether this statute, on its face and as here applied, is unconstitutional in that it invades the immunity of federal property from taxation by the states.

## STATUTES INVOLVED

Michigan Public Act 189 of 1953 and excerpts from the Military Leasing Act of 1947 are set forth in the Appendix, *infra*, pp. 29–33.

## STATEMENT

1. *The litigation.*—This is an action to recover taxes levied under the authority of Michigan Public Act 189 and paid to the City of Detroit by Borg-Warner Corporation under protest.

For some years, the United States has owned a Naval Industrial Reserve Plant consisting of an industrial plant, buildings and grounds located at 11111 French Road, Detroit, Michigan. (R. 31, 61–62.) Under a negotiated lease agreement dated August 14,

1950, and effective as of March 8, 1948, Borg-Warner leased from the Government a portion of the Naval Industrial Reserve Plant. (R. 61–87.)[1] As recited therein, the lease was made under the authority of the Act of Congress of August 5, 1947, c. 493, 61 Stat. 774, and with the approval of the Armed Services Committees of the Congress. (R. 62.)

The lease was for a five-year period ending March 7, 1953, unless sooner terminated. Borg-Warner had an option to extend the term for three additional terms of five years each upon certain conditions. (R. 65.) By amendment dated March 3, 1954, effective as of December 1, 1952, the lease was extended for the further term of five years from March 8, 1953. (R. 91–95.)

On June 10, 1953, Public Act 189, Michigan Public and Local Acts (1953), p. 252, entitled "AN ACT to provide for the taxation of lessees and users of tax-exempt property" (Appendix, *infra*, pp. 29–30), became effective. The amendment to the lease provided that, effective March 8, 1954, and thereafter, Borg-Warner should deduct from its semi-annual rental payments to the Government any taxes assessed against Borg-Warner on account of Public Act 189. At the same time, the Government reserved the right to contest the legality of Public Act 189. Borg-Warner agreed to cooperate with the Government in any litigation, pay taxes under Public Act 189 under protest, and turn over to the Government any such taxes recovered through litigation. (R. 93.)

[1] The details of the lease are set forth *infra*, pp. 5–9.

As of January 1, 1954, a tax was assessed against Borg-Warner under the authority of Public Act 189. (R. 31.) Pursuant to the requirements of the Act, the Board of Assessors of the City of Detroit valued the entire portion of the Naval Industrial Reserve Plant leased by Borg-Warner precisely as it would have done had such real property been owned in fee simple and occupied by Borg-Warner. The value of the real estate thus determined was $352,060. (R. 32–33.) Such valuation was set down upon the personal property tax rolls of the City of Detroit (R. 97), and a tax bill, characterizing the subject of the tax as personal property (R. 2, 11, 14), was issued to Borg-Warner (for the year 1954) in the amount of $12,323.50, a sum more than 3.5% of the assessed valuation. The Board of Assessors did not determine, nor was the tax based upon, the cash value of the right to use and occupy the portion of the Naval Industrial Reserve Plant leased to Borg-Warner by the United States. (R. 33–34.)

On August 16, 1954, Borg-Warner paid $6,161.75, representing the first half of the 1954 tax, to the Treasurer of the City of Detroit under protest. (R. 2–3, 11, 14.)

On September 14, 1954, appellants, as co-plaintiffs, filed an action in the Circuit Court of Wayne County for refund of the taxes paid. (R. 1–9.) It was alleged that Act 189 was repugnant to the Constitution of the United States in that it authorizes a tax upon property owned by the United States, infringes the sovereign immunity of the United States, and violates

the Fourteenth Amendment to the Constitution. (R. 5–8.)[2]

The case was presented upon stipulated facts and documentary evidence to the Circuit Court of Wayne County (R. 28–29), which entered judgment against appellants. The Supreme Court of Michigan affirmed, holding that the levy is a form of personal taxation, that it is imposed only upon the privilege of using property, and that it is not a tax against property. (R. 52, 56.) This appeal followed.

2. *The terms of the lease and the amendment thereto.*—As stated in the lease, the United States owns, and the Department of the Navy has custody and control of, the Naval Industrial Reserve Plant.[3] The Secretary of the Navy had determined that the plant, although not surplus, was not, for the time being, required for public use and that it was in the public interest to lease it to Borg-Warner under certain conditions. (R. 61–62.)

All of the plant, with the exception of an office building and passageway, is covered by the lease and is described therein as the "Facilities". The facilities include a manufacturing area and a storage area. (R. 64.) Borg-Warner is granted the right to use the manufacturing area "in its operations for the manufacture of automotive parts, agricultural implements and similar products and for no other purpose". (R. 66.) The lessee assumes the obligation

[2] There is no challenge to the valuation figure which the Board placed upon the fee.

[3] The lease and the amendment thereto are printed at R. 61–89, 91–95.

to execute the Government's directions for removal of all Government-owned machine tools, equipment and materials from the manufacturing area and for the storage of all such property in the storage area. Borg-Warner is permitted to use the storage area "for the storage and maintenance of Government-owned machine tools, equipment and material and for no other purpose". (R. 65–66.) The Government retains the right of access to the facilities for any purpose not inconsistent with the proper use of the facilities by Borg-Warner. (R. 65.)

Borg-Warner accepted the status of the Naval Industrial Reserve Plant as a standby facility against a national emergency and undertook to maintain it at all times so as to permit prompt reactivation for the manufacture of ordnance material. It agreed further that it would "not perform any acts other than in accordance with the terms of this lease, which might be harmful to or reduce or impair such status." (R. 66.)

The lease provides for a first-year rental of $20,400 and $2,400 per year thereafter, plus 54½ cents per year for each square foot which might later be added to the manufacturing area by removal of Government-owned materials from the storage area. (R. 66–67.) In addition, Borg-Warner is obligated to protect, preserve, maintain and repair the facilities and the Government-owned machine tools, equipment and materials in accordance with reasonable directions or requirements. The lease authorizes the Government to require expenditures by Borg-Warner for this maintenance and repair up to a maximum of $43,600

during the first year, $47,600 during the second year, and $45,600 during the third and succeeding years. In addition, Borg-Warner is to provide janitorial services for the storage and manufacturing areas and to carry insurance upon the facilities (not including, however, the Government-owned machinery, machine tools and equipment in the storage area). (R. 67–68, 70–72.)

The lease provides for termination by the Government in the following contingencies: (a) upon the declaration of a national emergency by the President or the Congress; (b) upon 120 days' notice by the Secretary of the Navy in the interests of national defense; (c) following a determination that the Naval Industrial Reserve Plant is surplus to the further needs of the Government and notice by Borg-Warner that it does not desire to exercise its right of first refusal; (d) upon 20 days' notice in the event of default by Borg-Warner in the terms of the lease (except where the default is due to certain enumerated causes beyond the control of Borg-Warner). (R. 73–75.)

Upon expiration or termination of the lease, Borg-Warner is obligated to replace and reinstall in their original positions all Government-owned machine tools, equipment and material, as required by the Government. (R. 80–81.)

Neither the lease nor any interest therein may be transferred or assigned by Borg-Warner except upon consent of the Government. (R. 84.)

All disputes concerning questions of fact arising under the lease are ultimately to be decided by the

Secretary of the Navy, whose decision is to be final and conclusive upon the parties. (R. 85.)

The lease further provided that (R. 78):

> In the event that as a result of any future Act of Congress subjecting Government-owned property to taxation, taxes, assessments, or similar charges are imposed by state or local authorities upon the property leased hereunder (other than upon Borg-Warner's possessory interest therein), Borg-Warner shall pay the same when due and payable and this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided for herein, which reduction shall not be greater than the amount of such taxes, assessments, or similar charges * * *.

The terms of the lease were subject to renegotiation upon renewal. (R. 69.)

Borg-Warner gave notice of its election to extend the original term for an additional period of five years and some of the provisions of the lease were renegotiated resulting in an amendment entered into as of December 1, 1952. (R. 91.)

The amendment extended the term of the lease for a period of five years commencing March 8, 1953, and ending March 7, 1958, unless sooner terminated. Borg-Warner also agreed to heat, at its own expense, the spaces which had been retained by the Government. In addition, Borg-Warner agreed to pay, upon execution of the amendment, additional back rent for the five-year term ending March 7, 1953, in the sum of $44,966.64, that amount representing the unex-

pended portion of the maximum yearly maintenance sums agreed upon for that period. Future rent was fixed at $24,000 per year for the five-year period ending March 7, 1958. (R. 92–93.) Maximum maintenance expenses for the new five-year period were set at $35,000 per year. (R. 94.) The amendment contained the following clause (R. 93):

> *Provided, further,* that, effective March 8, 1954, and throughout the remaining term of the extended lease, Borg-Warner shall deduct and pay from the stipulated semi-annual rental installments any taxes assessed against it under the provisions of Public Act 189 of the State of Michigan for the year 1953 or other taxation statutes coming into effect during the extended term of the lease and which attempt to tax Borg-Warner on the basis of the assessed value of the Facilities leased to it or on the basis of the value of its leasehold interest therein or for any other reason because of its use and occupancy of the same under this lease. Borg-Warner will pay the personal taxes assessed against its own property located in said Facilities. The Government reserves the right to contest the legality of said Public Act 189 or any other of such described taxation statutes coming into effect during the extended term of the within lease, and, should it successfully do so, Borg-Warner shall repay to the Government any taxes actually refunded by such determination. Borg-Warner agrees to cooperate with the Government in respect to such possible litigation, including the payment of such taxes under protest, if so required by the Government.

SUMMARY OF ARGUMENT

1. Since *McCulloch* v. *Maryland*, 4 Wheat. 316, it has been settled constitutional doctrine that property of the United States is beyond the taxing power of the states. This does not mean that non-discriminatory taxation of those with whom the Federal Government chooses to deal (*e. g.*, contractors or suppliers) is invalid merely because there may be an indirect economic effect upon the Government—an effect stemming from the fact that some or all of the tax might be passed along to the Government as consumer. See *James* v. *Dravo Contracting Co.*, 302 U. S. 134, in which the United States supported the constitutionality of the state tax levied upon the contractor.

While decisions in this area often involve close and difficult questions, the cases make clear, at a minimum, that a direct imposition on federal property must fail, and that "special legislation" calculated or designed to reach federal property is to be condemned. In making its determination whether a state tax violates the federal immunity, this Court will look to substance, not merely to form and nomenclature; and it will not be bound by the state court's characterization of the tax. *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368. Particularly, the Court will be mindful that "[a]ctual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes", and that typically the attempt to levy upon federal property is made by assessing the party through whom the Government is acting. *United States* v. *Allegheny*

*County*, 322 U. S. 174, 187–188. A line must be drawn between a tax which is aimed at the property or gains of those who deal with the Government and a tax which levies upon Government property in private hands. *Id.*, pp. 186–189.

2. Applying these principles, it is evident, from the language and operation of Michigan Act 189, that the statute is invalid, both because the levy which it commands is a direct imposition upon federal property and because it is "special legislation" peculiarly designed to have this effect.

There is no question that Michigan could tax Borg-Warner's separate interest in the leasehold which it holds from the Government. If consent to that were needed, Congress has explicitly granted it in the Military Leasing Act of 1947 (Appendix, *infra*, pp. 30–33). Michigan has refused, however (as did Pennsylvania in the *Allegheny County* case, *supra*), to separate the interest of the lessee from the Governmental interest. Its statute directs that, in the case of a lessee of tax-exempt property, there shall be a tax "in the same amount and to the same extent as though the lessee or user were the owner of such property." The assessors have proceeded accordingly and have collected a tax from the lessee admittedly based upon the entire value of the fee.

However this tax be denominated—as an *ad valorem* property tax (as we believe it in essence to be) or as a tax on "the privilege of using the real estate" (the characterization of the Supreme Court of Michigan)—it is unquestionably measured by values which are inherent in the United States by virtue of its

ownership of the fee (cf. *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 499), and it is imposed upon those values to the direct detriment of the United States. The key to the tax is the way it works. Michigan collects from the Government's lessee of improved property the same amount whether he has a short-term lease subject to numerous contingencies or a 999-year lease without restriction. And, in either event, it collects the same amount as it would collect from a private owner of a fee of equivalent value. Even if one were to ignore the realities and look merely to the fact that this tax is, in form, a tax upon the lessee, the scheme would be unconstitutional since the conclusive presumption which it invokes—that the interest of the lessee is tantamount to the value of the fee—is wholly arbitrary.

It is no answer that collection is from the lessee. "Rarely does a state or municipality pursue the Federal Government itself." *Allegheny County* case, 322 U. S. at 188. Nor is it significant that the taxing statute forswears a lien upon the property. "[R]enunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being ta.. d." *Id.*, p. 187.

If the operation of the statute permitted any doubt of its character, the proviso clause would dispel it. Michigan forgives the tax, ostensibly a tax upon the lessee for the privilege of holding the property, if the Federal Government makes an equivalent payment. One could not ask for plainer articulation of the underlying purpose. This "statute must fail even if but for its purpose or special operation it would be

perfectly good." *Miller v. Milwaukee*, 272 U. S. 713, 715.

The opinion of the Supreme Court of Michigan in a companion case (pending before this Court as Nos. 37 and 38, this Term) suggests that Act 189 is being sustained by that court because it is deemed fair to require contribution by the United States in respect of federal property situated in the State. The short answer is that our constitutional system "leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests." *Allegheny County, supra*, 322 U. S. at 191. It is appropriate to add, however, that the Congress, by various statutes, has undertaken to accord limited waivers of immunity, to make payments in lieu of taxes, to confer outright grants in aid and to enter revenue-sharing arrangements. It is estimated that federal assistance to states and localities will exceed 5.5 billion dollars in fiscal 1958. The adequacy or inadequacy of the federal program—a complex question, indeed—is not a matter for determination by the courts, either state or federal; the adjustment of the "benefits and burdens" which result from the presence of federal property and activities "is for other departments." *Id.*, p. 190.

## ARGUMENT

### I

### PROPERTY OF THE UNITED STATES IS IMMUNE FROM LOCAL TAXATION

The doctrine of implied governmental immunity goes back to *McCulloch* v. *Maryland*, 4 Wheat. 316.

As the Court there declared, the supreme sovereignty of the Federal Government within its sphere is clear, as are its right to utilize means of its own choosing in carrying out its delegated powers and the right of its properties, functions and instrumentalities to be free of state interference occasioned by the exercise of the latter's taxing powers. The Court "never has departed from that basic doctrine or wavered in its application." *United States* v. *Allegheny County*, 322 U. S. 174, 176. Its decisions in *Mayo* v. *United States*, 319 U. S. 441, *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 561–562, 566–567, and *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 117–118, show the undiminished vigor of this principle, from which it follows that the tax in controversy cannot stand if (as we shall urge) it is actually levied on Federal property.

Since *James* v. *Dravo Contracting Co.*, 302 U. S. 134, in which the United States supported the constitutionality of the state tax involved, it has also been settled that non-discriminatory state taxation of those with whom the Federal Government chooses to deal (*e. g.*, contractors or suppliers) does not interfere "in any substantial way with the performance of federal functions" (p. 161) merely because there may be indirect economic effect, *i. e.*, passing some or all of the tax along to the Government as consumer. See *Alabama* v. *King & Boozer*, 314 U. S. 1, 8–9; cf. *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, 347 U. S. at 118–119. If, however, the burden on the Government is substantial and direct, the tax is not saved from

invalidity because the state has adopted procedures to assess against, and collect from, those with whom the Government deals, rather than the Government itself. A tax may not be nominally imposed upon private persons to accomplish the collection of a tax against the United States which could not otherwise be levied. *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643, 645. And special legislation aimed at federal property is, of course, invalid. *Miller* v. *Milwaukee*, 272 U. S. 713.

Of the many cases upholding federal immunity from state taxation, only two (*Clallam County* v. *United States*, 263 U. S. 341, and *Mayo* v. *United States*, *supra*) involved attempts to collect taxes or fees directly from the United States. Typically, the local authority has proceeded against a private person, asserting the tax to be one levied upon him or upon his private property. *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151; *United States* v. *Rickert*, 188 U. S. 432; *Irwin* v. *Wright*, 258 U. S. 219; *United States* v. *Allegheny County*, *supra*; *S. R. A., Inc.* v. *Minnesota*, *supra*.[1] But neither form nor nomenclature is controlling over substance. As the cited cases establish, if the levy is in substance a direct imposition upon the Federal Government or its property—if, otherwise stated, the Government is the

[1] Other cases invalidating tax assessments against third persons are: *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *McShane*, 22 Wall. 444; *Colorado Co.* v. *Commissioners*, 95 U. S. 259; *Sargent* v. *Herrick*, 221 U. S. 404; *Hussman* v. *Durham*, 165 U. S. 144; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 609.

real taxpayer—the tax must fail, even though the state has confined itself (for obvious reasons) to proceedings against a private person.[5]

Those cases which have allowed state taxation despite the claim of implied immunity (*James* v. *Dravo Contracting Co., supra; Alabama* v. *King & Boozer, supra; Curry* v. *United States*, 314 U. S. 14; *Wilson* v. *Cook*, 327 U. S. 474; *S. R. A., Inc.* v. *Minnesota, supra; Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495) rest upon the conclusion that the tax in question was one based upon the private person's individual gain or advantage, whether obtained by way of receipts, profits, privilege or ownership. In brief, non-discriminatory taxes have been upheld when applied to persons who sought immunity "*for their property or gains* because they are engaged in operations under a government contract or lease." *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, 363; emphasis added. As the Court stated it in *United States* v. *Allegheny County*, 322 U. S. 174, 186: "* * * what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands."

In the *Allegheny County* case, the State of Pennsylvania, administering an ordinary and non-discriminatory property tax, sought to include in an assess-

[5] In other contexts as well, the Court has recognized that "[t]he person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself." *Colorado Bank* v. *Bedford*, 310 U. S. 41, 52.

ment of a contractor's property Government-owned machinery possessed by the taxpayer under a lease. This Court held (p. 189) that "Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee." As the Court has more recently stated, also in a case involving a bailee of federal property, a tax measured by the worth of federal property would be void. *Esso Standard Oil Co. v. Evans, supra,* 345 U. S. at 499.[6]

## II

MICHIGAN ACT 189, ON ITS FACE AND AS HERE APPLIED, RESULTS IN A DIRECT IMPOSITION OF TAX UPON FEDERAL PROPERTY. IT IS ALSO "SPECIAL LEGISLATION" DIRECTED AT FEDERAL PROPERTY.

Michigan Act 189, Section 1 (Appendix, *infra,* p. 29), provides (with exceptions not here pertinent) that when any real property exempt from taxation is leased to a private person there shall be a tax "in the same amount and to the same extent as though the lessee or user were the owner of such property." A proviso adds that this "shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed * * *." In short, Section 1 makes the private *lessee* of federal property liable for such tax as a non-exempt *owner* of such property would be required to pay, but permits the avoidance of such tax

[6] See, also, *Grumman Aircraft Eng. Corp. v. Board of Assessors of Town of Riverhead,* 2 N. Y. 2d 500, petition for certiorari pending, No. 136, this Term.

if the Federal Government makes an equivalent contribution.

Section 2 of the Act provides (Appendix, *infra*, pp. 29–30) that taxes "shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not become a lien against the property."[7]

Acting under the mandate of the state statute, the Board of Assessors of the City of Detroit has valued the Naval Industrial Reserve Plant in precisely the same manner as it would have done had the plant been owned by Borg-Warner,[8] and Borg-Warner has paid (under protest) precisely the same taxes it would have been required to pay if it had been in fact the owner. The ultimate question, then, may be simply stated:

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[7] While the taxing statute here involved relates to realty, there would be no reason, if it is constitutionally valid, why similar taxes could not be imposed by the states upon personal property of the United States in private hands. For an indication of the extent of such property, see *United States* v. *Allegheny County*, *supra*, 322 U. S. at 189.

[8] No consideration was given to the five-year term subject to prior termination upon the happening of any of a number of enumerated events (R. 73–75) and subject to renegotiation upon renewal (R. 69). No consideration was given to the qualifications upon the right to use the manufacturing area, or to the prohibition against use of the storage area except for storage of Government-owned material. (R. 66.) No attempt was made to evaluate the substantial obligations of protection, preservation, maintenance, and repair of the Government-owned material and facilities. (R. 67–68.) Here, as in the *Allegheny County* case (322 U. S. at 187), "[t]he full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in [the] assessment."

Has Michigan taxed interests in property which are owned by the Federal Government?

It should be stressed at the outset that there is no question in this case as to whether Michigan might undertake to appraise the value of Borg-Warner's interest in the leasehold and to impose a tax upon that separable interest.[9] If, under prior law, any valid claim of immunity could have been asserted for that narrowly circumscribed interest, Congress expressly waived it by the Military Leasing Act of 1947 (Appendix, *infra*, pp. 30–33), Section 6 of which makes the lessee's interest (but only the lessee's interest) subject to state or local taxation.[10] As was true of Pennsylvania in the *Allegheny County* case, Michigan here has not attempted to draw any line between the Government's interest as owner and the possessor's interest as lessee.[11] Michigan's position necessarily stands or falls on the bare proposition that it can collect from a private lessee of federal property precisely the same quantum of tax, measured by full value of the fee, as it would collect from a non-exempt owner of a fee having an identical value.

As numerous divided decisions of this Court attest, close and difficult questions are often presented when one seeks to determine the incidence of a tax or the burden of a tax. But certainly (see discussion, *supra*,

[9] The question whether a purely personal beneficial interest in Government-owned property could be accurately valued and taxed to a private person in possession of such property was reserved in the *Allegheny County* case (322 U. S. at 186).

[10] This section was considered and provided the basis of decision in *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253.

[11] See note 8, *supra*.

pp. 13–17) the Court's decisions bear out, at a minimum, that there can be no direct imposition of a tax upon federal property,[12] and that the Court will strike down any tax which is special or discriminatory in the sense that it is one calculated to destroy the immunity of the Federal Government.[13] So viewed, this case is not a close one. Both the effect and the purpose of the statute are such that it is patently invalid.

The language and the operation of the statute make it unmistakably plain, on the face of it, that this is a tax which reaches, and is calculated to reach, the entire Governmental interest and not merely such interest as may be in the lessee. This may be illustrated by posing three hypothetical cases involving three identical pieces of improved property. Let us assume that each parcel of property consists of land and an office building with a life expectancy of 75 years, and that each has an appraised value of $1,000,000. Property "A" is both owned and occupied by a private corporation. Property "B" is owned by the United States and leased for 75 years to a commercial tenant, with no restrictions upon the tenant and no right in the United States to terminate before lease expiration. Property "C" is owned by the United States and leased to a tenant for a term of 5 years, subject to numerous restrictions on the tenant. Under Michigan law, the tax would be exactly the same for the owner of "A" and for the lessees of "B" and "C", *i. e.*,

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[12] *Mayo* v. *United States*, 319 U. S. 441; *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

[13] *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *United States Bank*, 9 Wheat. 738, 840–841; *Miller* v. *Milwaukee*, 272 U. S. 713.

$1,000,000 multiplied by the applicable tax rate. There is thus no escape from the conclusion that the tax, in essence, is one on the whole of the property. Obviously, the interest of the short-term lessee of "C" is insubstantial as compared to the interest of the long-term lessee of "B" (who would have for 75 years the continued use of the office building) and even less substantial as compared to the interest of the owner of "A". Yet the tax, which, under the statutory requirements, is measured by the value of the fee, is identical in all three cases.

Pointing to the title of Act 189 ("Taxation of lessees and users of tax-exempt property; exception"), to the provision that the tax shall be assessed to the lessee or user and to the further provision that the tax shall not become a lien against the property, the Supreme Court of Michigan has characterized the tax as "a form of personal taxation" (a tax on "the privilege of using the real estate") and the procedures for collection as "more analogous to procedures *in personam* than *in rem*". (R. 52–53.) This Court, however, is not bound by the nomenclature of the tax or by the state court's characterization; in order to ascertain whether there is an invasion of federal immunity, it must determine for itself the nature and effect of the levy. *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387–388; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443; *United States* v. *Allegheny County*, *supra*, 322 U. S. at 184; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, 347 U. S. at 121–122.

The scheme of Act 189—that the tax upon the pri-

vate lessee of tax-exempt property shall be the same as if he were the owner—makes it transparently clear, we believe, that this is not a tax restricted to the interest of the lessee (or to the value of the lessee's "privilege") and that it invades the federal immunity. It may be added that, even if viewed as a tax upon the lessee, the statute would suffer from a constitutional infirmity, for it invokes a conclusive presumption which is wholly arbitrary and must fall under the Fourteenth Amendment:[14] the presumption that the bundle of rights enjoyed by a lessee of tax-exempt property has the same value as the fee itself.

Conceivably, one might denominate any ordinary "property" tax as a "privilege" tax. A property interest is ordinarily regarded as an aggregation of rights and privileges possessed by the owner. So viewed, a so-called tax on property is virtually indistinguishable, as a conceptual matter, from a tax on the privilege of holding the property. The question here, of course, is not one of names but of substance—whether, in fact, the imposition is one which falls upon values owned by the United States. It seems undeniable, as we have pointed out above, that it does, since the tax collected from the Government's lessee is precisely the same as upon a private owner of a fee having equivalent value.[15]

The conclusion that the tax here (however it be denominated) is in essence the same as the ordinary

[14] See *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Hooper* v. *Tax Commission*, 284 U. S. 206. Cf. *Heiner* v. *Donnan*, 285 U. S. 312.

[15] It is equally clear that the monetary burden is on the

*ad valorem* property tax which Michigan levies upon non-exempt property is scarcely altered by the fact that Michigan proceeds, for purposes of collection, against the lessee. The numerous cases in which this Court has held that there was an invasion of federal immunity have typically taken that form. See *supra*, p. 15. "Rarely does a state or municipality pursue the Federal Government itself." *United States* v. *Allegheny County, supra*, 322 U. S. at 188. Moreover, it should be noted that it is familiar practice in Michigan (and elsewhere) to collect ordinary property taxes (both on realty and personalty) from either the owner or from the occupier or user.[16] Col-

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United States and not on Borg-Warner. Article 1f of the original lease provided (R. 78):

> In the event that as a result of any future Act of Congress subjecting Government-owned property to taxation, taxes * * * are imposed by state or local authorities upon the property leased * * *, Borg-Warner shall pay the same * * * and this lease shall be renegotiated so as to accomplish an equitable reduction in the rental * * *.

In addition, following the enactment of Act 189, the lease was renegotiated (R. 91) to provide for the deduction from the rental to the Government of taxes paid by Borg-Warner under the Act. (R. 93.)

Apart from the specific provisions in the contract between the United States and Borg-Warner, it is plain, in all events, that the rental which property will yield when leased depends directly on the extent of the liabilities which the lessee will incur.

[16] Sec. 211.3, C. L. Mich. 1948 (Mich. Stats. Anno., 1950 Revision, § 7.3) provides:

> Real property shall be assessed * * * to the owner if known, and also to the occupant, if any; if the owner be not known, and there be an occupant, then to such occupant, and either or both shall be liable for the taxes on said property, * * *.

See *Engineering Society* v. *Detroit*, 308 Mich. 539, 550–551.

The state may similarly collect a tax on personal property

lection from the user (if that course be adopted) makes the tax no less a tax upon the property of the owner. Indeed, the user may make himself whole by proceeding, in turn, against the owner.[17]

Nor is it significant that Section 2 of Act 189 carefully renounces a lien against the exempt real estate. "* * * [R]enunciation of any lien on Government property itself, which could not be sustained in any event, hardly establishes that it is not being taxed." *Allegheny County* case, *supra,* 322 U. S. at 187.

What has been said above as to the operation of this taxing statute not only requires the conclusion that this levy is a direct imposition upon federal property; it shows no less that the legislation was specially aimed at such property. Only lessees or users of tax-exempt property are taxed by the pertinent provisions of Act 189. And they are taxed not on the basis of their interests, but on the basis of the values of the fees which they occupy. As this Court pointedly stated in *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 629: . . .

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from a tenant or person in possession, in which event such person has a specific statutory right to recover from the owner for whose benefit the tax was paid. Sec. 211.44, C. L. Mich. 1948, as amended (Mich. Stats. Anno., 1955 Cum Supp. § 7.87); Sec. 211.47, C. L. Mich. 1948 (Mich. Stats. Anno., 1950 Revision, § 7.91).

[17] From an early date, the Michigan Supreme Court has taken the view that an occupant of real property who has paid the taxes thereon is entitled to offset the amount so paid as against rentals due the owner. *Taylor* v. *Roniger*, 147 Mich. 99, 105. This rule has been codified in Sec. 211.53, C. L. Mich. 1948 (Mich. Stats. Anno., 1950 Revision, § 7.97). As to a user who has paid taxes on personal property, see note 16, *supra.*

> The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach.

There is further eloquent testimony of this statute's purpose—the proviso clause of Section 1, which states in substance that the tax (though it is ostensibly upon the lessee) will be forgiven if the United States makes a payment "equivalent" to the tax. Michigan itself has thus recognized that under Act 189 the United States is the real taxpayer. The case, we submit, is one falling squarely within the doctrine of *Miller* v. *Milwaukee*, 272 U. S. 713 (involving a statute which sought to reach, by indirect means, exempt income from United States bonds): "the statute must fail even if but for its purpose or special operation it would be perfectly good" (p. 715).[18] See, also, *Packard Motor Car Co.* v. *City of Detroit*, 232 Mich. 245.

In the companion case of *Continental Motors Corp.* v. *Township of Muskegon*, Nos. 37, 38, this Term, the Supreme Court of Michigan stated (346 Mich. 218, 255) that Act 189 is legislation which seeks "equality in the sharing of burdens and benefits of local government."

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[18] It is no answer to suggest that the statute is broad enough to permit imposition of the tax upon those who lease from the State of Michigan. When Michigan taxes its own lessees, it takes money from one pocket and places it in the other. For to the extent that it taxes the lessee, there is a *pro tanto* reduction in the amount of rental that it can command in the market as lessor. When Michigan taxes values owned by the United States, the United States suffers direct loss. And, of course, Michigan cannot, in any event, insist upon a waiver of immunity by the United States, however it may choose to deal with property leased from the State.

At bottom, this seems to be an assertion that it is fair to require contribution by the United States in respect of federal property situated in the State. The short answer is that our constitutional system "leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests." *Allegheny County* case, *supra*, 322 U. S. at 191.

It is also appropriate to observe, however, that the Congress has made, and is constantly in the process of making, extensive provision for contribution to the costs of state and local government. It has enacted legislation authorizing, in certain circumstances, that various departments and agencies of the Government make payments in lieu of taxes to localities where federal property is situated. The sum authorized is not always equivalent to the amount which might have been assessed had the property been privately owned. Congress, in some instances, has provided that benefits accruing to the state or local government by reason of the federal activity be considered in arriving at the payment to be made.[19] In other instances, Congress has provided that federally-provided services for the maintenance of its property be taken into account.[20] In at least one instance, Congress has de-

[19] See, *e. g.*, Section 9 of the Atomic Energy Act of 1946, c. 724, 60 Stat. 755; Section 2 of the Act of June 29, 1936, c. 860, 49 Stat. 2025.

[20] See *e. g.*, Section 308 of the Defense Housing and Community Facilities and Services Act of 1951, c. 378, 65 Stat. 293. Compare Section 511 of the Housing Act of 1956, c. 1029, 70 Stat. 1091, which, following this Court's decision in *Offutt Housing Co. v. Sarpy County*, 351 U. S. 253, amended Sec-

termined that all other payments made by the Federal Government to the taxing authority shall also be considered.[21]

Quite apart from permissive taxation or payments in lieu of taxes, the Federal Government has a vast program of financial assistance to state and local governments, such as direct grants or revenue-sharing arrangements. In the fiscal year 1956, federal aid to states and localities totaled $3,752,565,187. The Bureau of the Budget has estimated, on the basis of existing and proposed legislation, that the total assistance for the fiscal year 1958 will rise to $5,501,991,789. See Budget of the United States Government for the Fiscal Year Ending June 30, 1958, pp. 1127–1133.

Whether the federal program is adequate or inadequate is not, of course, a matter for determination here. The point is simply that Congress, and Congress alone, is empowered to waive the federal immunity and to determine the extent of that waiver. The Military Leasing Act authorized local taxation of the lessee's interest in the property here involved. The Michigan statute is invalid because it ignores that

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tion 408 of the Housing Amendments of 1955, c. 783, 69 Stat. 635, to provide that taxes upon the interest of a lessee of a so-called Wherry Act Housing project are to be diminished, first, by the value of services provided by the Federal Government which are ordinarily provided by taxing authorities; second, by value of such services provided by the lessee; and, third, by federal payments made "with respect to such property."

[21] Section 403 of the Defense Housing and Community Facilities and Services Act of 1951, c. 378, 65 Stat. 293.

limitation and seeks to reach the entire governmental interest in the property.

## CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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SEPTEMBER 1957.

# APPENDIX

Michigan Public and Local Acts (1953), p. 252:

PUBLIC ACT No. 189

AN ACT to provide for the taxation of lessees and users of tax-exempt property.

*The People of the State of Michigan enact:*

211.181 Taxation of lessees and users of tax-exempt property; exception. [M. S. A. 7.7 (5)]

SEC. 1. When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public, shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property: *Provided, however,* That the foregoing shall not apply to federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or property of any state-supported educational institution.

211.182 Assessment and collection; action of assumpsit. [M. S. A. 7.7 (6)]

SEC. 2. Taxes shall be assessed to such lessees or users of real property and collected in the same manner as taxes assessed to owners of real property, except that such taxes shall not be-

come a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township, city, village, county and school district for which the taxes were assessed and shall be recoverable by direct action of assumpsit.

This act is ordered to take immediate effect.

Approved June 10, 1953.

Act of August 5, 1947, c. 493, 61 Stat. 774 [The Military Leasing Act of 1947]: [22]

[SEC. 1.] [As amended by Sec. 605, Act of September 28, 1951, c. 434, 65 Stat. 336.] * * * That whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and

[22] Repealed by Section 53, Act of August 10, 1956, c. 1041, 70A Stat. 641, and re-enacted in revised form by the same Act as 10 U. S. C., Section 2667. Section 6 of the Act of August 5, 1947, now appears as Section 2667 (e) of 10 U. S. C., which reads as follows:

The interest of a lessee of property leased under this section may be taxed by State or local governments. A lease under this section shall provide that, if and to the extent that the leased property is later made taxable by State or local governments under an act of Congress, the lease shall be renegotiated.

conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. Notwithstanding section 321 of the Act of June 30, 1932 (47 Stat. 412; U. S. C., title 40, sec. 303b), or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or services shall be furnished by the Department concerned to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not apply to oil, mineral, or phosphate lands.

(34 U. S. C. 1952 ed., Sec. 522a.)

SEC. 3. (a) Notwithstanding any other provision of law, all right, title, and interest of

Reconstruction Finance Corporation in any plants or facilities, and the machinery, equipment, and other personal property accessory thereto, acquired by Defense Plant Corporation or Reconstruction Finance Corporation in accordance with authority contained in the Reconstruction Finance Corporation Act (U. S. C., title 15, secs. 601–617) pursuant to undertakings by the War Department or the Navy Department to reimburse Defense Plant Corporation or Reconstruction Finance Corporation to the extent of the unrecovered cost thereof in the event Congress authorizes such reimbursement by making appropriations therefor, shall be transferred by Reconstruction Finance Corporation (or by War Assets Administration, if such property has been declared surplus) to the War Department or the Navy Department upon certification by the Secretary of War or the Secretary of the Navy made within six months after the enactment hereof, that the retention of such plants or facilities, and the machinery, equipment, and other personal property accessory thereto, by the War Department or the Navy Department, as the case may be, is necessary for the maintenance of an adequate Military or Naval Establishment including industrial reserve.

(b) Notwithstanding any other provision of law, all right, title, and interest of Reconstruction Finance Corporation or War Assets Administration in any machinery or equipment shall be transferred by the agency having control thereof to the War Department or the Navy Department upon certification by the Secretary of War or the Secretary of the Navy made within six months after the enactment hereof, that the retention of such machinery or equipment by the War Department or the Navy Department, is necessary for the maintenance

of an adequate Military or Naval Establishment, including industrial reserve.

(34 U. S. C. 1952 ed., Sec. 522b.)

SEC. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated.

(34 U. S. C. 1952 ed., Sec. 522c.)